An Introduction to Federal Guideline Sentencing

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Table of Contents

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For lawyers accustomed to discretionary sentencing practice, the federal sentencing guidelines present an alien—and dangerous—world. Because of their complexity, the sentencing guidelines can be a minefield for the defense, inflicting casualties on clients and attorneys alike, and increasing exponentially the effort required to provide effective representation. To be a successful advocate in the guidelines regime, defense counsel must become fully involved in a case at the earliest possible time. In all defense efforts—from seeking release, to investigation, to discovery, to plea negotiations, to the trial itself—counsel must not only weigh traditional considerations, but also take into account the dangers and possibilities of the sentencing guidelines. The starting point is a thorough understanding of the guideline sentencing process.

BEFORE THE SENTENCING GUIDELINES, federal trial courts enjoyed broad discretion to sentence defendants within the statutory limit. While defendants could receive parole, their sentences were largely insulated from appellate review. Under guideline sentencing, the court's discretion to fix sentence is cabined within a guideline range that may be a small fraction of the statutory limit. Applying the guidelines to a case produces two numerical values, an offense level and a criminal history category. Those two values yield a guideline range in the sentencing table, expressed in months. The guideline range fixes the limits of the sentence, unless the court determines that a factor not adequately considered by the Sentencing Commission warrants imposition of a sentence outside the range. Guideline sentences are not parolable, but they are subject to a limited right of review on appeal.

To introduce the attorney to guideline sentencing, this paper first examines the statutory basis of guideline sentencing, and then reviews the structure of the guidelines themselves. It describes the mechanics of applying the guidelines to a typical case, discusses plea bargaining, and offers caveats of some traps for the unwary. This treatment is not exhaustive; it provides an overview that will facilitate gaining a working knowledge of guideline sentencing.

The Basic Statutory System

The guideline sentencing provisions of the Sentencing Reform Act took effect November 1, 1987. They apply to offenses committed or

continued on or after that date. The Act created determinate sentencing: eliminating parole and greatly restricting good time, it insured that defendants would serve nearly all the sentence that the court imposed. The responsibility for shaping these determinate sentences was delegated to the United States Sentencing Commission. The Commission is an independent body within the judicial branch, with authority to promulgate sentencing guidelines and policy statements, consistent with the governing statutes. The Commission's enabling legislation, codified at 28 U.S.C. §§ 991–998, includes a number of congressional directives as to the content of the guidelines. It states the purposes of the Commission, including the parallel goals of providing "certainty and fairness" in sentencing, while avoiding "unwarranted sentencing disparities." § 991(b)(1)(B). The principal provisions that directly govern sentencing are codified in the criminal code, 18 U.S.C. chs. 227 (Sentences), 229 (Postsentence Administration), 232 (Miscellaneous Sentencing Provisions), 232A (Special Forfeiture of Collateral Profits of Crime), and 235 (Appeal).

Imposition of Guideline Sentence; Departure. Under the guideline regime, the district court's sentencing authority is set out by 18 U.S.C. § 3553. This section directs the court to consider a variety of factors before imposing sentence, including the guidelines and policy statements issued by the Sentencing Commission. § 3553(a). But the broad range of factors to be considered does not signify an equally broad range of sentencing discretion. To the contrary, the section requires the court to "impose a sentence of the kind, and within the range" specified in the applicable guideline, absent a valid ground for departure. § 3553(b). Departures are authorized only when "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . . that should result in a sentence different from that described." *Id*.

Guidelines and Statutory Minimums. In addition to the guideline range and the possibility of departures, counsel must always consider the sentence limits prescribed by statute. If the guidelines call for a sentence above the statutory maximum, or below a statutory minimum, the statutory limit controls. *See* United States Sentencing Guideline (U.S.S.G.) §5G1.1. A number of federal statutes include minimum sentences that can trump the otherwise applicable guideline range. There are three that counsel must be particularly aware of: the drug statutes, the "three strikes" law, and the Armed Career Criminal Act. Each of these provisions severely enhances the minimum penalties for offenses on the basis of a defendant's past convictions.

Drug minimums. The federal drug statutes provide two types of mandatory minimum sentences. One is based on criminal history; for defendants who have previously been convicted of drug offenses, the statute establishes increasing minimum sentences, up to life imprisonment. To obtain these recidivism-based enhancements, the government must give formal notice and follow the procedures of 21 U.S.C. § 851. The other type is based on the amount involved; for certain drugs in certain amounts, §§ 841(b) and 960(b) provide minimum sentences of 5 or 10 years' imprisonment. Unlike the recidivism enhancements, there is no statutorily-required special pleading for enhancements based on drug amount—they may be considered, without notice, for the first time at sentencing.[1]

Three strikes. Federal law mandates life imprisonment for a person convicted of a serious violent felony who has two or more separate prior state or federal convictions for serious violent felonies or serious drug offenses. 18 U.S.C. § 3559(c). Each predicate crime must have been committed after conviction for the previous predicate crime. In seeking a sentence

under § 3559(c), the government must meet the procedural requirements of 21 U.S.C. § 851.

Armed Career Criminal Act. A defendant convicted of unlawful firearm possession under 18 U.S.C. § 922(g) normally faces a maximum term of 10 years' imprisonment. The Armed Career Criminal Act increases this punishment range, to a minimum of 15 years and a maximum of life imprisonment, if a defendant has three prior convictions for either a violent felony or a serious drug offense. § 924(e)(1). Unlike the three strikes law, § 924(e) contains no procedural notice requirements, and it does not require that the defendant have committed each predicate crime after conviction for the previous one. The Sentencing Commission has promulgated an armed career criminal guideline, U.S.S.G. §4B1.4, which can provide for sentences far above the statute's 15-year minimum.

Sentencing Below a Statutory Minimum. Federal law authorizes sentences below a statutory minimum in only two circumstances: cooperation and a limited "safety valve."

Substantial assistance. The court, on motion by the Government, may "impose a sentence below a level established by statute as [a] minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. § 3553(e). The court is required to follow the guidelines and policy statements in imposing the reduced sentence; policy statement §5K1.1, discussed in more detail below, sets out the factors to be considered in departing from the guideline range on a Government substantial-assistance motion. Note, however, that a §5K1.1 motion will not authorize a sentence below the statutory minimum unless the Government specifically requests such a sentence. *Melendez v. United States*, 518 U.S. 120 (1996).

Safety valve. Under 18 U.S.C. § 3553(f), the statutory minimum for certain drug crimes is removed if the court finds that the crime did not result in death or serious injury and that the defendant has minimal criminal history, was neither violent, nor armed, nor a high-level participant, and provided the Government with truthful, complete information regarding the offense of conviction and related criminal conduct. The safety-valve statute is mirrored in guideline §5C1.2.

No Parole; Restricted Good-Time Credit. Federal prisoners do not receive parole, and they can receive only limited credit to reward satisfactory behavior in prison. For sentences in excess of one year, other than life, credit is fixed at a maximum of 54 days per year. 18 U.S.C. § 3624(b). If a prisoner serving imprisonment for a nonviolent offense completes a substance-abuse treatment program, the Bureau of Prisons may reduce the time to be served by an additional year. § 3621(e)(2).

Supervised Release and Probation. While defendants serving guideline sentences cannot receive parole, they are still subject to two types of non-incarceration sentence: supervised release and probation. Although the effects of these sentences are very different, many of the same rules apply to their imposition, conditions, and revocation.

Supervised release. Except for petty offenses, when a defendant is sentenced to imprisonment, the prison term ordinarily will be followed by a term of supervised release. Some statutes mandate imposition of supervised release, and the pertinent guideline requires supervised release following any imprisonment sentence longer than a year. U.S.S.G. §5D1.1(a). Except as otherwise provided, the authorized maximum terms increase with the grade of the offense, from one year, to three years, to five years.

Probation. Unlike supervised release, probation is imposed in lieu of imprisonment, not in addition to it. Probation is precluded (1) for Class A or Class B felonies (offenses carrying

maximum terms of 25 years or more, life, or death); (2) for offenses that expressly preclude probation; and (3) for a defendant who is sentenced at the same time to imprisonment for a non-petty offense. 18 U.S.C. § 3561(a). Even when probation is permitted by statute, however, the guidelines bar straight probation unless the bottom of the guideline range is zero, or the court departs below the range. *See* U.S.S.G. §5B1.1(a), §5C1.1. (See discussion of Chapter Five below, under "The Guidelines Manual.")

Conditions and revocation. The court has discretion in imposing conditions of probation and supervised release. However, federal law makes a number of conditions mandatory, including that the defendant refrain from unlawful use of a controlled substance and submit to drug testing. 18 U.S.C. §§ 3563(a)(5), 3583(d). The court may ameliorate or suspend the testing condition if the defendant presents a low risk of future substance abuse.

Probation or supervised release may be revoked upon violation of any condition. Revocation is mandatory for possession of a controlled substance, for refusal to comply with drug-testing conditions, and for prohibited possession of a firearm. 18 U.S.C. §§ 3565(b), 3583(g). In accordance with Sentencing Commission guidelines, the court must consider whether the availability of treatment programs, or the defendant's participation in them, warrant an exception from the mandatory revocation rules. *See* §§ 3563(e), 3583(d).

Upon revocation of probation, the court may impose any sentence under the general sentencing provisions available in 18 U.S.C. Chapter 227, Subchapter A. § 3565(a)(2). On revocation of supervised release, the court may imprison the defendant up to the maximum terms listed in § 3583(e)(3), even if the listed sentence is longer than the term of supervised release originally imposed. If the court imposes less than the maximum prison term, it may impose another term of supervised release to begin after imprisonment. In that event, the revocation prison term and the new supervised release term combined cannot exceed the term of supervised release authorized by statute for the original offense. § 3583(h).

The Sentencing Commission has promulgated non-binding policy statements for determining the propriety of revocation and the sentence to imposed. (See discussion of Chapter Seven below, under "The Guidelines Manual.")

Fines and Restitution. In addition to the other potential penalties, federal defendants face fines and restitution orders.

The maximum fines for most title 18 offenses are set out in 18 U.S.C. § 3571. In general, the maximum fine for an individual is $250,000 for a felony, $100,000 for a Class A misdemeanor not resulting in death, and $5,000 for any lesser offense. It may be higher if so specified in the law setting forth the offense. Interest accrues on any fine of more than $2,500 that is not paid in full before the fifteenth day after judgment, and additional penalties apply to a delinquent or defaulted fine. § 3612(f)–(g). A defendant who knowingly fails to pay a delinquent fine is subject to resentencing, § 3614, and a defendant who willfully fails to pay a fine may be prosecuted for criminal default, § 3615.

Restitution is mandatory for crimes of violence, property crimes, and product tampering, § 3663A(c). It may also be mandated by the statute setting out the substantive offense. A restitution order may include expenses incurred by the victim while participating in the investigation or prosecution of the case or attending proceedings in it. § 3663(b).

While the guidelines ordinarily make both fines and restitution mandatory, a defendant's inability to pay, now or in the future, may preclude a fine or restitution payments above a nominal amount. U.S.S.G. §5E1.1, §5E1.2.

Review of a Sentence. Under 18 U.S.C. § 3742, either the defendant or the Government may appeal a sentence on the grounds that it was (1) "imposed in violation of law"; (2) "imposed as a result of an incorrect application of the sentencing guidelines"; or (3) "imposed for an offense for which there is no sentencing guideline and is plainly unreasonable." § 3742(a)–(b). Additionally, the defendant may appeal a departure above the guideline range, and the Government may appeal a departure below it. § 3742(a)(3), (b)(3). These appeal rights are limited if, pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C), the parties enter into a specific sentence agreement. § 3742(e). (See discussion of Rule 11(e)(1)(C) under "Plea Bargaining Under the Guidelines.")

Reduction or Correction of Sentence. Federal law severely limits the court's authority to reduce a sentence after it is imposed. The court has no authority to reduce a sentence except on motion of the Government, to reflect a defendant's post-sentence assistance in the investigation or prosecution of another person who has committed an offense. FED. R. CRIM. P. 35(b). The motion must be made within one year after imposition of sentence, unless the defendant did not know the information or evidence until a year or more after sentence was imposed. *Id*.

The court's authority to correct sentences is also limited; it can correct an illegal sentence only on remand following an appeal under 18 U.S.C. § 3742. FED. R. CRIM. P. 35(a). However, "[t]he court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." FED. R. CRIM. P. 35(c).

Sentence Modification. Under 18 U.S.C. § 3582(c), the court may modify an imprisonment term only in certain limited circumstances: (1) upon motion of the Director of the Bureau of Prisons, and a finding that "extraordinary and compelling reasons warrant such a reduction"; (2) "to the extent otherwise expressly permitted by statute" or by Federal Rule of Criminal Procedure 35; and (3) in the case of a defendant whose sentencing range was later lowered by a retroactive guideline amendment.

Application to Juveniles. Although the sentencing guidelines do not apply directly in determining the disposition of a juvenile delinquent, the Juvenile Delinquency Act bars committing a juvenile to official detention for longer than the maximum sentence that would be available for a similarly-situated adult, after application of the sentencing guidelines. *See* 18 U.S.C. § 5037 (c)(1)(B); U.S.S.G. §1B1.12, p.s.; *United States v. R.L.C.*, 503 U.S. 291 (1992).

Statutory Amendments and Ex Post Facto. A number of the statutory provisions outlined above have been substantively amended since the original passage of the Sentencing Reform Act in 1984. Counsel should challenge, under the Ex Post Facto Clause, the retrospective application of any harmful substantive amendment of the statutory provisions applicable at sentencing. *See, e.g., Lynce v. Mathis*, 519 U.S. 433 (1997) (retroactive amendment of state sentencing law awarding jail credits increased punishment, and thus violated Ex Post Facto).

The Guidelines Manual

The *Guidelines Manual* comprises eight chapters and three appendices, including a statutory index. To undertake the defense of a guidelines case, counsel must have a thorough understanding of Chapters One, Three, Four, Five, and Six, as well as all sections of Chapter Two, Offense Conduct, that may arguably apply to the case. In a revocation of probation or supervised release, counsel must study the policy statements in Chapter Seven. If the defendant is an organization, Chapter Eight, Sentencing of Organizations, applies.

Chapter One: Introduction and General Application Principles. In Chapter 1, Part A, the Commission states its authority and statutory mission, defines its basic approach, and discusses its resolution of major issues. This discussion is important to an understanding of key guidelines concepts such as relevant conduct and departures. In Part B, the Commission excepts petty offenses from the coverage of the guidelines and provides general application principles: definitions, the rules for determining the applicable guideline, and the significance of commentary. Perhaps the most important of these principles are the rules for determining relevant conduct.

Relevant conduct. Relevant conduct is a concept central to guidelines sentencing, one that counsel must completely master to provide effective representation. Guideline §1B1.3 requires that a defendant's offense level be determined by consideration of conduct far broader than the offenses of which he is convicted. It requires sentencing on "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." §1B1.3(a)(1). When others were involved, the defendant's guideline range will also reflect "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity," whether or not charged as a conspiracy. *Id*.[2] For many offenses, such as drug crimes, relevant conduct extends even further, to "acts and omissions" that were not part of the offense of conviction, but "were part of the same course of conduct or common scheme or plan as the offense of conviction." §1B1.3(a)(2). Relevant conduct need not be included in formal charges to be used at sentencing. §1B1.3, comment. (backg'd). Indeed, a guideline sentence may be based on conduct underlying dismissed or acquitted counts, provided the sentencing judge finds the conduct was reliably established by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148 (1997) (per curiam).

The effect of relevant-conduct sentencing must be considered at every stage of representation. It is especially important in the context of plea bargaining. (See discussion under "Plea Bargaining Under the Guidelines.")

Guidelines, policy statements, and commentary. In the Sentencing Reform Act, Congress authorized the Sentencing Commission to promulgate both sentencing "guidelines," 28 U.S.C. § 994(a)(1), and "general policy statements regarding application of the guidelines," § 994(a)(2). Guidelines, but not policy statements, are binding absent a ground for departure. *See* U.S.S.G. Ch.1, Pt.A(4)(b), para. 1, p.s. However, when "a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable Guideline," and failure to follow it constitutes guideline misapplication. *Williams v. United States*, 503 U.S. 193, 201 (1992).

The Commission also issues commentary to accompany both guidelines and policy statements. The commentary "may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines." U.S.S.G. §1B1.7; *see also Stinson v. United States*, 508 U.S. 36, 38 (1993). Commentary may also "suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement." §1B1.7.

Chapter Two: Offense Conduct. Offense conduct forms the vertical axis of the sentencing table. Chapter Two divides the offense-conduct guidelines into nineteen parts. A single guideline may cover one statutory offense, or many. Each

guideline provides a base offense level; it may also have one or more specific offense characteristics that adjust the base level up or down. A guideline may cross-reference other guidelines that invoke a significantly higher offense level. When no guideline has expressly been promulgated for an offense, Part 2X, Other Offenses, applies. This part also provides the guidelines for certain conspiracies, attempts, and solicitations; aiding and abetting; accessory after the fact; and misprision of a felony.

Drug cases. In drug and drug-conspiracy cases, the offense level is generally determined by quantity, using "the entire weight of any mixture or substance containing a detectable amount of the controlled substance." U.S.S.G. §2D1.1(c) (drug quantity table) note *. "[M]ixture or substance" does not include "materials that must be separated from the controlled substance" before it can be used. §2D1.1, comment. (n.1).[3] When no drugs are seized or "the amount seized does not reflect the scale of the offense," the court must "approximate the quantity." *Id.*, comment. (n.12). In cases involving agreements to sell a controlled substance, the agreed-upon quantity is used to determine the offense level unless the completed transaction establishes a different quantity, or the defendant demonstrates that he did not intend to produce, or was not reasonably capable of producing, the negotiated amount. *Id*. With the exception of methamphetamine and PCP, drug purity is not a factor in determining the offense level. However, "unusually high purity may warrant an upward departure." *Id.*, comment. (n.9).

Under §2D1.1(b)(6), an offense level of 26 or greater is reduced by 2 levels if the defendant meets the criteria of the safety-valve guideline, §5C1.2.

Chapter Three: Adjustments. Chapter Three sets out offense-level adjustments of general application. A defendant may incur an adjustment for hate-crime motivation or vulnerable victim; official victim; restraint of victim; or terrorism. U.S.S.G. Ch.3, Pt.A. In any offense committed by more than one participant, a defendant may receive an upward adjustment for aggravating role, a downward adjustment for mitigating role, or no adjustment. *Id.*, Pt.B. A defendant who abused a position of trust, used a special skill, or used a minor in committing a crime may receive an upward adjustment. *Id*.

Reckless Endangerment and Obstruction. A defendant who recklessly endangered another during flight will receive an upward adjustment, U.S.S.G. §3C1.2, as will a defendant who willfully obstructed the administration of justice, §3C1.1. Under a 1998 amendment, obstruction of justice can occur during the investigation, prosecution, or sentencing of the offense of conviction, of relevant conduct, or of a closely related case. Examples of conduct warranting the obstruction adjustment include committing or suborning perjury, destroying or concealing material evidence, or "providing materially false information to a probation officer in respect to a presentence or other investigation for the court." *Id.*, comment. (n.4).[4] Some uncooperative behavior or misleading information, such as lying about drug use while on pretrial release, does not justify an upward adjustment. *Id.*, comment. (n.5).

Multiple counts. When a defendant has been convicted of more than one count, the multiple-count rules of Chapter 3, Part D, must be applied. Its guidelines produce a single offense level encompassing all counts of conviction. Counts that involve "substantially the same harm" are grouped together, §3D1.2, unless a statute requires imposition of a consecutive sentence, §3D1.1(b). If the offense level is based on aggregate harm (such as the amount of theft losses or the weight of controlled substances), the level for the group is determined by the aggregate for all the counts combined. §3D1.3(b). Otherwise, the offense level for the

group is the level for the most serious offense. §3D1.3(a). When there is more than one group of counts, §3D1.4 may produce a combined offense level higher than the level of any group. Groups of roughly comparable seriousness produce the greatest increase; a group that is less serious than the most serious group produces an intermediate increase; and a group that is substantially less serious than the most serious group produces no increase. Grouping may also increase the offense level of a defendant who pleads guilty to a single count, if the plea agreement stipulates to an additional offense, or the conviction is for conspiracy to commit more than one offense. §1B1.2(c)–(d) & comment. (n.4).

Acceptance of responsibility. Under Chapter 3, Part E, a defendant who "clearly demonstrates acceptance of responsibility for his offense" ordinarily receives a downward adjustment of two, or in certain cases, three offense levels. A defendant who received an adjustment for obstruction, however, is not ordinarily entitled to an adjustment for acceptance of responsibility. *See* §3E1.1, comment. (n.4). Pleading guilty provides "significant evidence" of acceptance of responsibility, §3E1.1, comment. (n.3), but does not gain the adjustment as a matter of right. On the other hand, a defendant is not "automatically preclude[d]" from receiving the adjustment by going to trial. *Id.*, comment. (n.2).(This subject is discussed more fully under "Plea Bargaining Under the Guidelines.")

Chapter Four: Criminal History and Criminal Livelihood. The defendant's criminal history forms the horizontal axis of the sentencing table. A criminal record is translated into a criminal history category by guidelines that assign points for prior convictions, based primarily upon length of the sentence imposed. U.S.S.G. §4A1.1. A prior sentence for conduct that is part of the instant offense does not count as criminal history. §4A1.2(a)(1). "Related cases" are treated as one sentence for purposes of the criminal-history calculation. §4A1.2(a)(2) & comment. (n.3).

Certain criminal convictions or juvenile adjudications are not counted because of staleness, their minor nature, or other reasons, such as constitutional invalidity. §4A1.2.[5] There is also a recency factor: Committing the instant offense within two years after release from imprisonment for certain prior convictions, or while under any form of criminal justice sentence, increases the criminal-history points. A minimum offense level is specified "[i]f the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood." §4B1.3.

Criminal-history departure. An important policy statement provides that when "the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes," the court may consider a departure from the guideline range. U.S.S.G. §4A1.3, p.s. This policy statement may support either an upward or a downward departure.

Career offender. In the Sentencing Reform Act, Congress sought to ensure that certain repeat offenders receive imprisonment at or near the statutory maximum. 28 U.S.C. § 994(h). In response, the Commission promulgated the "career offender" guideline, §4B1.1. It applies to an adult defendant convicted of a third offense that is defined as either a crime of violence or a controlled substance offense, and it produces a guideline range approximating the statutory maximum for the offense of conviction.[6] Chapter Four's definitions and instructions for computing criminal history apply to the counting of convictions under the career-offender guideline, §4B1.2, comment. (n.3); therefore, questions of remoteness, invalidity, or whether prior convictions were "related cases" may be of utmost importance.

Armed career criminal. Guideline §4B1.4 applies to a person convicted under the Armed Career Criminal Act, 18 U.S.C. § 924(e). The guideline operates on both axes of the sentencing table, and it frequently produces a guideline range above that statute's mandatory minimum 15-year term.[7]

Chapter Five: Determining the Sentence; Departures. Chapter Five includes the sentencing table, a grid of sentencing ranges produced by conjunction of offense level and criminal history category. The table's grid is divided into four "zones." These zones determine a defendant's eligibility for "straight" probation, or a "split" sentence (probation or supervised release conditioned by some confinement). If a defendant's sentencing range is in Zone A, he can receive a sentence of straight probation (all the ranges in Zone A are zero to six months). §5B1.1(a)(1), §5C1.1(b). For sentencing ranges in Zone B, a defendant can be sentenced to less than the bottom of the range in prison, by substituting a probation or supervised release term that requires intermittent confinement, community confinement, or home detention. §5B1.1(a)(2), §5C1.1(c). Sentencing ranges in Zone C require that at least half the minimum term of the sentence be served in prison. §5C1.1(d). Sentencing ranges in Zone D require that the minimum term of the sentence be served in prison. §5C1.1(f).

Chapter Five also provides detailed guidelines for imposing a sentence of probation or fine, a restitution order, and a term of supervised release. Part G of the chapter explains sentencing for single and multiple count convictions, and includes complex rules for sentencing a defendant subject to an undischarged term of imprisonment.

Chapter 5, Part H sets out policy statements on the relevance to sentencing of certain offender characteristics, including age, education and vocational skills, employment record, family ties and responsibilities, and community ties. The Commission's policy is that these characteristics are "not ordinarily relevant" in determining the propriety of a departure. U.S.S.G. Ch.5, Pt.H, intro. comment. The operative word for the advocate is "ordinarily"—in extraordinary cases, one or more of those characteristics may support a departure. Even in the ordinary case, those characteristics may be relevant to sentencing decisions other than departure, such as where to fix sentence within the guideline range.

Chapter 5, Part K provides policy statements on departures. Section 5K1.1 authorizes a downward departure—on the Government's motion—if the defendant "has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." (See discussion of cooperation under "Plea Bargaining Under the Guidelines.") Section 5K2.0 states general principles to be used in determining whether a case lies outside the "'heartland' cases covered by the guidelines," thus permitting a departure. Part K goes on to discuss a number of factors that may warrant departure, but which are not susceptible of comprehensive advance analysis by the Commission. While most of these factors point to an upward departure, five of them may support a downward departure: (1) victim's wrongful provocation, (2) commission of a crime to avoid a perceived greater harm, (3) coercion and duress, (4) diminished capacity, and (5) voluntary disclosure of the offense. The Commission states elsewhere that it "has not dealt with the single acts of aberrant behavior" that may justify probation through departure. U.S.S.G. Ch.1, Pt.A(4)(d), para. 3, p.s. It acknowledges that, in addition to the factors set out in Part K, "[a]ny case may involve factors . . . that have not been given adequate consideration by the Commission." §5K2.0, p.s. Even when an offender characteristic or other circumstance is "not ordinarily relevant" to departure, "a combination of such characteristics or circumstances" may distinguish the case significantly from the

"heartland" cases. The Commission believes, however, "that such cases will be extremely rare." §5K2.0, comment.; *see also* Ch.5, Pt.H, intro. comment.[8] If the court intends to depart from the guideline range on a ground not identified in the presentence report or a pre-hearing submission, it must "provide reasonable notice that it is contemplating such ruling, specifically identifying the ground for the departure." U.S.S.G. §6A1.2, p.s., comment. (n.1); *see also Burns v. United States*, 501 U.S. 129 (1991).

Chapter Six: Sentencing Procedures and Plea Agreements. Chapter Six sets forth procedures for determining facts relevant to sentencing. It provides policy statements on the preparation and disclosure of the presentence report, resolution of disputed issues, and procedures respecting plea agreements and stipulations.

In resolving factual disputes, the court is not bound by the rules of evidence, but may consider any information that "has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. §6A1.3(a), p.s. The general rule is that the standard of proof for sentencing factors is a preponderance of the evidence, *id.*, comment. para. 4,[9] and the burden of ultimate persuasion rests on the party seeking to adjust the sentence.[10]

Policy statement §6B1.2 sets out the Commission's standards for acceptance of plea agreements. The standards differ depending on the type of agreement made. *See* FED. R. CRIM. P. 11(e)(1). While the parties may stipulate to facts as part of a plea agreement, "[t]he court is not bound by the stipulation, but may with the aid of the presentence report, determine the facts relevant to sentencing." §6B1.4(d), p.s. Before entry of a dispositive plea, prosecutors are encouraged, but not required, to disclose to the defendant "the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines." §6B1.2, p.s., comment. para. 5.

Chapter Seven: Violations of Probation and Supervised Release. This chapter sets out policy statements applicable to revocation of probation and supervised release. These policy statements classify violations; guide probation officers in reporting violations to the court; and propose disposition by reference to the grade of violation. For violations leading to revocation, policy statement §7B1.4 provides an imprisonment table similar in format to the sentencing table. While the ranges in the revocation table are not as binding as the ranges in the sentencing table, the court is required by statute to consider them. *See* 18 U.S.C. § 3553(a)(4)(B).

Chapter Eight: Sentencing of Organizations. When a convicted defendant is an organization rather than an individual, sentencing is governed by the guidelines and policy statements of this chapter.

Appendices. The official *Guidelines Manual* includes three appendices. Appendix A, a statutory index, specifies the offense-conduct guideline or guidelines ordinarily applicable to convictions under a particular statute. Appendix B sets forth selected sentencing statutes. Appendix C documents the many amendments to the guidelines, policy statements, and official commentary since the initial promulgation of the *Guidelines Manual*.

Applying the Guidelines

Sentencing worksheets prepared by the Commission are reproduced as an appendix to this paper. They are helpful in making a first calculation of a guideline sentence. Guideline §1B1.1 prescribes these steps:

• Prepare a separate Worksheet A (Offense Level) for each count of conviction. If the defendant has stipulated within the meaning of

§1B1.2(c) to having committed an additional offense, the stipulated offense must be treated as an additional count of conviction. Determine the applicable guideline by reference to guideline §1B1.2 and Appendix A – Statutory Index. (Stipulations under §1B1.2 are discussed in more detail below under "Some Traps for the Unwary.")

• From the offense-conduct guideline in Chapter Two, and by reference to guideline §1B1.3(a), Relevant Conduct, determine the base offense level and any applicable specific offense characteristics. Do not overlook any cross-reference to another offense guideline. The relevant-conduct guideline will frequently include in this calculation conduct from dismissed or acquitted counts, or even uncharged offenses. *See* §1B1.3, comment. (backg'd).

• Make all applicable adjustments from Chapter Three, Parts A, B, and C: victim-related adjustments, role in the offense, and obstruction. Note again that unless otherwise specified, these adjustments are based upon all relevant conduct as defined in guideline §1B1.3(a).

• If there is more than count, use Worksheet B to apply Chapter Three, Part D (Multiple Counts), to group the counts and adjust the offense level if indicated.

• Consider the anticipated adjustment, if any, for acceptance of responsibility under Chapter Three, Part E.

• Referring to Chapter Four, Part A, use Worksheet C to determine the criminal history category. Take care to examine any issues of staleness, exclusion, relatedness, or invalidity of prior convictions. Review the total criminal history—not just countable convictions—in light of policy statement §4A1.3, Adequacy of Criminal History Category, for possible grounds for departure.

• Proceeding to Worksheet D, check carefully whether the career-offender guideline, §4B1.1, or the criminal-livelihood guideline, §4B1.3, applies. Remember that these guidelines can dramatically increase the applicable range for an otherwise less serious offense. In an armed career criminal case, apply guideline §4B1.4.

• Using the total offense level and the criminal history category, determine the applicable guideline range from the sentencing table, Chapter Five, Part A. From this range, determine from Chapter Five, Parts B through G, the sentencing requirements and options. In a drug case, if a statutory mandatory minimum is higher than the calculated guideline range, consider whether the defendant qualifies for relief under the "safety valve" guideline, §5C1.2.

• Consider any possible grounds for departure, upward or downward. Take note of any specific suggestions for departure contained in commentary to the offense-conduct guidelines in Chapter Two. See, e.g., §2D1.1 comment. (n.14) (departure for certain defendants with mitigating role in high-base-offense-level drug case); *id.* (n.15) (downward departure in certain reverse-sting drug cases). Study the Commission's policy statements in the introduction, Chapter 1, Part A(4)(b), p.s.; in Chapter Five, Part H (Specific Offender Characteristics); and in Chapter Five, Part K (Departures). Keep in mind, however, that grounds for departure are not limited to those discussed by the Commission, and that factors not justifying departure individually may combine to support a departure in a particular case. *See* §5K2.0, p.s., comment. para. 1. A major part of sentencing advocacy on behalf of the defendant is resisting an upward departure and seeking a downward departure.

In preparing for sentencing, counsel must be familiar with the procedures governing disclosure of the presentence report, objections to the report, resolution of disputes in advance of sentencing, and identification for the court of unresolved issues. These procedures are set out

in Federal Rule of Criminal Procedure 32 and Chapter Six, Part A of the *Guidelines Manual*. Counsel must also stay informed of any local courts or practices rule pertaining to guideline sentencing. At the sentencing hearing, counsel must scrupulously observe traditional rules on preservation of error to protect issues for appeal under 18 U.S.C. § 3742.

Plea Bargaining Under the Guidelines

Federal Rule of Criminal Procedure 11(e)(1) and policy statement §6B1.2 describe three forms of plea agreement: charge bargain, sentence recommendation, and specific, agreed sentence. While other forms of plea agreement are possible, these are the most common, and each has important consequences under the guideline sentencing scheme. Defense counsel must carefully analyze the case to determine whether the supposed benefit of a plea disposition is real or illusory. Counsel should consider the effect of the guidelines governing relevant conduct, multiple counts, and acceptance of responsibility, as well as the policy statement on acceptance of plea agreements. Because cooperation by the defendant is a common element of a plea bargain, counsel must have a thorough understanding of the statutory and guideline provisions that affect cooperating defendants. Each of these subjects is discussed briefly below.[11]

Charge Bargaining. Policy statement §6B1.2(a) authorizes the court to accept a charge-dismissal agreement under Rule 11(e)(1)(A) if "the remaining charges adequately reflect the seriousness of the actual offense behavior" and acceptance of the agreement "will not undermine the statutory purposes of sentencing." Federal plea bargaining has typically involved this form of agreement, under which a defendant has the right to withdraw his plea if the court does not agree to dismiss the charges. Charge bargains, however, will often have little effect on the guideline range, because of the dramatic impact of two related guideline concepts: relevant conduct and multiple-count grouping.

Relevant conduct. The common plea agreement calling for dismissal of counts will not reduce the offense level if the subject matter of the dismissed counts is "relevant conduct" for purposes of determining the guideline range. For example, a defendant charged with multiple counts of distributing controlled substances who pleads guilty to only one count will usually have a base offense level determined from the total amount of drugs involved.

Despite the effect of relevant-conduct guidelines, charge bargaining remains important in the sentencing context. Because statutes "trump" guidelines, a given count may cap the maximum sentence below the probable guideline range for the case. This is not a departure; by operation of guideline §5G1.1(a), when the statutory maximum sentence is less than the minimum of the applicable guideline range, the statutory maximum becomes the guideline sentence. Similarly, a charge bargain may allow a defendant to avoid a statutory minimum that would raise a sentence above the otherwise-applicable statutory range. *See* §5G1.1(b) (statutory minimum becomes the guideline sentence if it is above the maximum of the otherwise applicable guideline range).[12] Even when the estimated guideline range falls within the statutory sentencing range, a charge bargain to a count with a lower statutory maximum could limit the extent of an upward departure. Finally, when counts are governed by different offense-conduct guidelines in Chapter Two, a plea to a particular count may produce a lower offense level.

Multiple counts. A corollary to the relevant-conduct rule, guideline §3D1.2 requires grouping of counts in many common prosecutions in which

separate charges involve substantially the same harm. "Grouping" means that a single guideline range applies to multiple counts of conviction. In such cases, the offense level will not be adjusted upward even if a defendant is convicted of multiple counts. However, in the case of offenses that the guidelines do not group—such as robberies—Chapter 3, Part D requires an upward adjustment for multiple convictions. Dismissing counts will avoid this adjustment, provided the defendant does not stipulate to all the elements of the dismissed offenses as part of a plea bargain. *See* §1B1.2(c). Regardless of the grouping rules, a conviction under some statutes—most notably 18 U.S.C. § 924(c)—statutorily requires a consecutive sentence.

Whenever a defendant faces multiple counts, counsel must perform the multiple-count calculation to determine whether avoiding conviction on some count will affect the guideline range. Even in a single-count prosecution, the defense must take care not to inadvertently invoke a multiple-count adjustment by stipulating to the elements of another offense.

Sentencing Recommendation. Rule 11(e)(1)(B) authorizes the prosecutor, in exchange for a plea of guilty or nolo contendere, to recommend, or agree not to oppose, a particular sentence. Under policy statement §6B1.2(b), a court may accept such a recommendation only if the proposed sentence is within the applicable guideline range, or departs from the range for justifiable reasons. In any event, sentence recommendations under Rule 11(e)(1)(B) are non-binding: a defendant who agrees to such a recommendation must understand that if the court rejects it, he is not entitled to withdraw the plea. FED. R. CRIM. P. 11(e)(2).

Specific Sentencing Agreement. Rule 11(e)(1)(C) authorizes a plea agreement that requires imposition of a specific sentence. As with sentence recommendations, these agreements may be approved if the agreed sentence is within the calculated guideline range or is a justified departure. U.S.S.G. §6B1.2(c), p.s. Rule 11(e)(1)(C) agreements are binding: If the court rejects the proposed sentence, the defendant is entitled to withdraw the plea.

Because Rule 11(e)(1)(C) bargains severely limit sentencing discretion, counsel seeking a binding agreement on the sentence may meet with resistance or categorical rejection. If an agreement to a specific sentence cannot be obtained, counsel should consider less restrictive forms that still afford the defendant a measure of protection. For example, the parties might agree under Rule 11(e)(1)(C) to one or more components of the sentencing determination: that sentence not exceed a certain length; that a particular guideline range apply; or that the court not depart. Counsel should also seek express agreement that if the court does not approve the parties' agreement on a sentence component, the defendant can withdraw the plea.

Acceptance of Responsibility. Sometimes, the only perceived guideline-range benefit for a plea of guilty may be the adjustment for acceptance of responsibility. Pleading guilty does not assure the adjustment, but it provides a basis for it. Demanding trial does not automatically preclude the adjustment, but usually renders it a remote possibility. The court's determination of acceptance of responsibility "is entitled to great deference on review." U.S.S.G. §3E1.1, comment. (n.5). Commentary explains that the adjustment for acceptance of responsibility is to be determined by reference to the offense of conviction; the defendant need not admit relevant conduct.[13] Nevertheless, while "a defendant may remain silent" about relevant conduct, "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." *Id.* (n.1(a)).

In evaluating the prospects for an acceptance-of-responsibility adjustment, counsel must guard against giving up a valuable right to contest the charges, solely in pursuit of an adjustment that must already be considered lost. Scrutinize all pertinent facts that may bear upon this determination, paying special attention to the possibility of an adjustment for obstruction of justice under guideline §3C1.1. *See* U.S.S.G. §3E1.1, comment. (n.4). When it is certain that a defendant will not receive the adjustment for acceptance of responsibility even upon a plea of guilty, and the plea confers no other benefit, then the plea will not improve the guideline range. Even so, a guilty plea may still diminish the risk of an upward departure, improve the possibility or extent of a downward departure, or produce a lower sentence within the guideline range.

Cooperation. Congress directed the Commission to assure that the guidelines reflect the general appropriateness of imposing a lower sentence "to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 28 U.S.C. § 994(n). In policy statement §5K1.1, the Commission requires a motion by the Government for a downward departure for substantial assistance. While this provision is a policy statement, not a guideline, the Government's motion is seen as "a condition limiting the court's authority" to reduce sentence. *United States v. Wade*, 504 U.S. 181, 185 (1992) (dictum).[14] A sentence below a statutory minimum on the basis of substantial assistance similarly requires a motion by the Government. 18 U.S.C. § 3553(e). Absent a Government motion for downward departure, the court can still consider cooperation in placing the sentence within the guideline range or determining the extent of a departure based on other grounds. By contrast, "[a] defendant's refusal to assist authorities . . . may not be considered as an aggravating sentencing factor." §5K1.2, p.s.

To qualify for a departure, a cooperating defendant's assistance must relate to the investigation or prosecution of another person. While "[s]ubstantial weight should be given to the Government's evaluation of the extent of the defendant's assistance," the significance and usefulness of the defendant's assistance is ultimately a determination for the court. §5K1.1(a)(1), p.s. & comment. (n.3).

A defendant contemplating cooperation should always seek the protection of Rule 11(e)(6) and guideline §1B1.8. Rule 11(e)(6)(D) renders inadmissible any statement made in the course of plea discussions with an attorney for the Government, even though the discussions do not ultimately result in a guilty plea. *Cf.* FED. R. EVID. 410 (same). They may become admissible, however, if the defendant introduces other statements made during the same negotiations.[15]

Guideline §1B1.8 permits the parties to agree that self-incriminating information provided by a cooperating defendant will not be used to determine the applicable guideline range, except as provided in the agreement. Guideline §1B1.8 has limited effect: self-incriminating information can still be used to determine the guideline range if it was previously known to the Government; if it relates to criminal history; in prosecutions for perjury or false statement; and if the defendant breaches the cooperation agreement. Moreover, §1B1.8 protects the defendant only in determining the guideline range, not from fixing the sentence higher within the range or departing upward. While it is the "policy of the Commission" that information so barred from the determination of the guideline range "shall not be used" for an upward departure, §1B1.8, comment. (n.1), counsel should seek an agreement that expressly precludes using the information as a basis for any increase in sentence.

Some Traps for the Unwary

Pretrial Services Interview. In most courts, a pretrial services officer (or probation officer designated to perform pretrial services) will seek to interview arrested persons before their initial appearance, to gather information pertinent to the release decision. The information will be made available to the prosecutor, the defense counsel, and the probation officer preparing the presentence report. 18 U.S.C. § 3153(c)(1), (c)(2)(C). Absent specified exceptions, however, information obtained during pretrial services functions "is not admissible on the issue of guilt in a criminal judicial proceeding." § 3153(c)(3). Certain information pertinent to the release decision—including criminal history (especially juvenile adjudications and tribal court convictions that might otherwise be unavailable), earnings history, and use of a special skill—can raise the guideline range for imprisonment and fine, or provide a basis for upward departure. It is imperative, therefore, for counsel to advise the defendant of these considerations before the interview, with due regard for the absolute necessity that any information provided be truthful. A finding that the defendant provided false information can lead to denial of acceptance of responsibility, an upward adjustment for obstruction, or the filing of additional charges. As a corollary, counsel who enters a case after the report is prepared must learn what information was acquired during the pretrial services function, to be aware of its probable effect on the sentence.

Stipulation to More Serious Offense. As a general rule, the court must use the guideline section in Chapter Two, Offense Conduct, that is most applicable to the offense of conviction (including any guideline required by a cross-reference). Under a crucial exception, however, if a plea agreement "contain[s] a stipulation that specifically establishes a more serious offense," the court must use the guideline applicable to the more serious stipulated offense. U.S.S.G. §1B1.2(a). For this exception to apply, the stipulation must establish every element of the more serious offense, including the requisite intent. *Braxton v. United States*, 500 U.S. 344 (1991). While such a stipulation can be useful as part of an express plea bargain, no defendant should inadvertently trigger a more serious offense level by agreeing to an overbroad factual basis in pleading guilty.

Presentence Interview and Report. In most cases, a probation officer will provide a presentence investigation report to the court before imposition of sentence. 18 U.S.C. § 3552(a); FED. R. CRIM. P. 32(b). The importance of the report cannot be overstated. In it, the probation officer will make fact findings, perform guideline calculations, and identify potential grounds for departure. Many of these determinations, while nominally objective, have significant subjective components. The officer's attitude toward the case or the client may substantially influence the sentence recommendations—recommendations which enjoy considerable deference from both the sentencing judge and the reviewing court. For these reasons, the effective and zealous advocate must independently review all elements of the probation officer's report, and indeed all aspects of the case, to make any necessary objections and affirmatively present the defense case for a favorable sentence. Defense counsel should never assume that the probation officer has arrived at a favorable recommendation, or even a correct one.

The probation officer's presentence investigation will usually include an interview of the defendant. Broader than the one conducted by pretrial services, this interview has even greater potential to aggravate a sentence in specific, foreseeable ways. Disclosing undetected relevant conduct may, by operation of guideline §1B1.3, increase the offense level. Information first revealed during the presentence interview may

affect Chapter Three adjustments, and undiscovered criminal history may increase the criminal history score or provide a ground for departure. Conduct not otherwise apparent, such as drug use and criminal associations, may result in a higher sentence within the guideline range or an upward departure.

Because the presentence interview holds many perils, the defendant must fully understand its function and importance, and defense counsel should attend the interview. In some cases, counsel may decide to limit the scope of the presentence interview. While the privilege against self-incrimination applies to sentencing issues, *Mitchell v. United States*, 119 S. Ct. 1307 (1999), refusal to submit to an unrestricted pre-sentence interview may be hazardous. It could jeopardize the adjustment for acceptance of responsibility or adversely affect other incidents of the sentence, including the placement of the sentence within the guideline range. There is no fixed solution to this dilemma; counsel must make an informed decision as to the best course in the context of a particular case.

Guideline Amendments. The guidelines are subject to periodic review and revision. 28 U.S.C. § 994(*o*). Consistent with § 994(p), the Commission submits regular guideline amendments to Congress on or shortly before May 1 of each year, to take effect November 1, absent congressional modification or disapproval. Since the guidelines were first promulgated in 1987, they have been amended 589 times. All the amendments, along with explanatory notes, are contained in appendix C to the *Guidelines Manual*. Counsel should become familiar with each new round of submitted amendments as soon as they are published in the Federal Register.

Normally, the guidelines in effect on the date of sentencing apply. §1B1.11(a). However, when a guideline amendment takes effect between the commission of the offense and the date of sentencing, and leads to a higher sentencing range, its application may be barred by the Ex Post Facto Clause. *See, e.g.*, *United States v. Bell*, 991 F.2d 1445, 1447 & n.4 (8th Cir. 1993) (collecting cases); *see also Miller v. Florida*, 482 U.S. 423 (1987) (applying the Clause to a state guideline sentencing scheme). Each guideline includes a historical note which facilitates determining whether the guideline has been amended since the offense was committed. If ex post facto principles require use of an earlier guideline, the Commission states that "[t]he Guidelines Manual in effect on a particular date shall be applied in its entirety." U.S.S.G. §1B1.11(b)(2).

Particular attention must be paid to amendments that the Commission denominates "clarifying." Clarifying amendments are intended to explain the meaning of previously-promulgated guidelines, and the Ex Post Facto Clause may not bar their application to offenses committed before their effective date. If a proposed clarifying guideline amendment benefits the client, counsel should seek its application even before the effective date, arguing that it provides authoritative guidance as to the meaning of the current guideline. On the other hand, counsel should not automatically accede to retroactive application of a harmful guideline amendment, simply because the Commission characterized it as "clarifying."

Validity. In keeping with express statutory language and with general principles of delegation, the Sentencing Commission's guidelines, policy statements, and commentary must be consistent with every pertinent provision of titles 18 and 28 of the United States Code. 28 U.S.C. § 994(a). They must also, of course, conform to the requirements of the Constitution. *See Mistretta v. United States*, 488 U.S. 361 (1989) (considering constitutional challenges to guideline sentencing). Counsel must scrutinize all unfavorable provisions for both statutory and constitutional validity, with special attention to recent amendments.

Telephone Support

The Federal Defender Training Group, sponsored by the Administrative Office of the U.S. Courts, provides a toll-free hotline for defender organizations and attorneys providing defense services under the Criminal Justice Act. The number is (800) 788-9908. The Sentencing Commission also offers telephone support on the guidelines, at (202) 502-4545.

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Endnotes

1. *See Edwards v. United States*, 118 S. Ct. 1475 (1998) (guidelines require the sentencing judge, not the jury, to determine both the kind and amount of drugs involved in a drug conspiracy). The holding in *Edwards* may require reexamination in light of the Supreme Court's subsequent ruling in *Jones v. United States*, 119 S. Ct. 1215 (1999). In *Jones*, the Supreme Court, in the context of construing the federal carjacking law, 18 U.S.C. § 2119, found it to be a constitutional principle that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." The amount of drugs involved increases the maximum penalty under the federal drug statutes; accordingly, *Jones* would seem to require that drug amount must be alleged in the indictment and proven at trial, before increased penalties. Penalty enhancements based on recidivism appear to be unaffected by *Jones*, however. *See* 119 S. Ct. at 1226–27; *cf. Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (prior conviction not element of offense under 8 U.S.C. § 1326(b)). Following a guilty plea, of course, the judge may not impose a sentence greater than the maximum explained during the plea colloquy.

2. Relevant conduct, however, does not include conduct of conspiracy members prior to the defendant's joining the conspiracy, even if the defendant knows of that conduct. §1B1.3, comment. (n.2.)

3. For purposes of determining whether a statutory minimum penalty applies, the term "mixture or substance" may include the carrier medium. *Compare Chapman v. United States*, 500 U.S. 453, 468 (1991) (statutory minimum for LSD determined by including carrier medium) *with* U.S.S.G. §2D1.1(c) note *(H) (carrier medium not included in weight of LSD; each dose treated as 0.4 mg).

4. Note that when a defendant challenges an obstruction adjustment based on perjury at trial, the court must "make independent findings necessary to establish a willful impediment to or obstruction of justice," or an attempt to do so, within the meaning of the federal perjury statute. *United States v. Dunnigan*, 507 U.S. 87, 95 (1993).

5. The guidelines "do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law." §4A1.2, comment. (n.6). In this connection, see *Custis v. United States*, 511 U.S. 485 (1994) (defendant being sentenced under Armed Career Criminal Act may not collaterally attack validity of a predicate state conviction except on ground of violation of right to counsel); *Nichols v. United States*, 511 U.S. 738 (1994) (a prior uncounseled misdemeanor conviction with no imprisonment imposed may be used to enhance punishment upon a later conviction, even if it increases imprisonment).

6. For purposes of the career-offender guideline, the "statutory maximum" for an offense is the maximum term available including any statutory sentencing enhancements. *United States v. LaBonte*, 520 U.S. 751 (1997).

7. Guideline §4A1.2's rules for counting prior sentences do not affect the determination whether a defendant is subject to an enhanced sentence as an armed career criminal under § 924(e), and cannot lower an armed career criminal history score below Category IV. §4B1.4(c) & comment. (n.1).

8. For an extensive analysis of the *Guidelines Manual*'s methodology of departures, see *Koon v. United States*, 518 U.S. 81 (1996). In its 1998 amendments, the Commission incorporated *Koon*'s analysis into the commentary to policy statement §5K2.0.

9. In specific contexts, the guidelines or due process may require that a higher standard of proof apply in some specific contexts. *See, e.g.*, U.S.S.G. §3A1.1(a) (to increase offense level for hate-crime motivation, court must find supporting facts beyond a reasonable doubt);

United States v. Kikumura, 918 F.2d 1084, 1103 (3d Cir. 1990) (when the court "departs upward dramatically," due process requires that "factual findings must be supported by clear and convincing evidence, and hearsay statements cannot be considered unless other evidence indicates that they are reasonably trustworthy") (footnote omitted).

10. For suggestions on possible procedures for sentencing hearings, see Edward R. Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses Be Applied?*, 22 CAP. U. L. REV. 1 (1993).

11. For further discussion of this topic, see DONALD A. PURDY JR., *Plea Bargaining: What Is the Problem and Who Is Responsible*, 8 FED. SEN. R. 331 (1996), and DONALD A. PURDY JR. & JEFFREY LAWRENCE, *Plea Agreements Under the Federal Sentencing Guidelines*, 26 CRIM. L. BULL. 483 (1990).

12. It is important to keep in mind that, in drug conspiracy cases, courts will likely determine the applicability of an amount-based minimum sentence by reference to relevant-conduct principles. Some circuits have held, however, that the statutory minimum applies only to the quantity involved in the conduct charged and proven by the prosecutor. *See, e.g.*, *United States v. Darmand*, 3 F.3d 1578, 1581 (2d Cir. 1993) (conspiracy charge); *United States v. Winston*, 37 F.3d 235, 240 (6th Cir. 1994) (substantive drug charges). *But see United States v. Reyes*, 40 F.3d 1148, 1151 (10th Cir. 1994) (disagreeing with *Darmand*). For a review of the cases addressing this important topic, see Catharine M. Goodwin, *Determining Mandatory Minimum Penalties in Drug Conspiracy Cases: Moving Toward More Individualized Sentences*, 59 FED. PROBATION, Mar. 1995, at 74; *available at* < http://www.ussc.gov/training/rcmm.pdf > .

13. By contrast, the mandatory minimum "safety valve" specifically requires the defendant to provide the Government with all information and evidence concerning not only the offense, but also "offenses that were part of the same course of conduct or of a common scheme or plan." §5C1.2(5).

14. One appellate panel has stated that, even if the government does not file a motion under policy statement §5K1.1, a defendant may be able to obtain a lower sentence for substantial assistance under the court's general departure authority. *In Re Sealed Case*, 149 F.3d 1198 (D.C. Cir. 1998). Other circuits have disagreed, and *In Re Sealed Case* has been vacated, and the case is being considered by the full District of Columbia Circuit. 159 F.3d 1362 (D.C.Cir. 1998) (en banc) (granting rehearing and vacating panel opinion in part); *see also United States v. Solis*, 169 F.3d 224 (5th Cir. 1999) (disagreeing with *In Re Sealed Case*); *United States v. Abuhoran*, 161 F.3d 206 (3d Cir. 1998) (same).

15. The Supreme Court has held that a defendant may waive the protections of Rules 11(e)(6) and 410 as part of the plea agreement. *United States v. Mezzanatto*, 513 U.S. 196 (1995).

Worksheet A (Offense Level)

Defendant _____ District/Office _____

Docket Number (Year-Sequence-Defendant No.) ____ ____-____ ____ ____ ____ ____-____ ____

Count Number(s) _____ U.S. Code Title & Section _____: _____

_____: _____

Guidelines Manual Edition Used: 19____

Instructions:

For each count of conviction (or stipulated offense), complete a separate Worksheet A. Exception: Use only a single Worksheet A where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)) or where a count of conspiracy, solicitation, or attempt is grouped with a substantive count that was the sole object of the conspiracy, solicitation, or attempt (see §3D1.2(a) and (b)).

1. **Offense Level** (See Chapter Two)
Enter the applicable base offense level and any specific offense characteristics from Chapter Two and explain the bases for these determinations. Enter the sum in the box provided.

Guideline	Description	Level
_____	_____	_____(base)
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
	Sum	☐

2. **Victim-Related Adjustments** (See Chapter Three, Part A)
Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0." §_____ ☐

3. **Role in the Offense Adjustments** (See Chapter Three, Part B)
Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0." §_____ ☐

4. **Obstruction Adjustments** (See Chapter Three, Part C)
Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0." §_____ ☐

5. **Adjusted Offense Level**
Enter the sum of Items 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Item 1. ☐

☐ *Check if the defendant is convicted of a single count. In such case, Worksheet B need not be completed.*

☐ *If the defendant has no criminal history, enter criminal history "I" here and on Item 4, Worksheet D. In such case, Worksheet C need not be completed.*

U.S. Sentencing Commission
October 23, 1997
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Worksheet B
(Multiple Counts or Stipulation to Additional Offenses)

Defendant _____ Docket Number _____

Instructions

Step 1: Enter the adjusted offense level from Worksheet A in the box(es) provided for: (1) counts grouped under §3D1.2(d) or (2) a count charging conspiracy, solicitation, or attempt that is grouped with the substantive count of conviction (see §3D1.2(a)).

Step 2: Combine the remaining counts resulting in conviction into distinct groups of closely related counts by applying the rules specified in §3D1.2 and explain the reasons for grouping below.

NOTES: _____

_____

Step 3: For every group of closely related counts determined at Step 2, enter from Worksheet A the count with the highest adjusted offense level (see §3D1.3).

Step 4: Enter the number of units to be assigned to each group (see §3D1.4) as follows:

- One unit (1) for the group of closely related counts with the highest offense level
- An additional unit (1) for each group that is equally serious or 1 to 4 levels less serious
- An additional half unit (1/2) for each group that is 5 to 8 levels less serious
- No increase in units for groups that are 9 or more levels less serious

1. **Adjusted Offense Level for the First Group of Closely Related Counts**
   Count number(s):_____ ☐ _____ (unit)

2. **Adjusted Offense Level for the Second Group of Closely Related Counts**
   Count number(s):_____ ☐ _____ (unit)

3. **Adjusted Offense Level for the Third Group of Closely Related Counts**
   Count number(s):_____ ☐ _____ (unit)

4. **Adjusted Offense Level for the Fourth Group of Closely Related Counts**
   Count number(s):_____ ☐ _____ (unit)

5. **Adjusted Offense Level for the Fifth Group of Closely Related Counts**
   Count number(s):_____ ☐ _____ (unit)

6. **Total Units** _____ **(total units)**

7. **Increase in Offense Level Based on Total Units (See §3D1.4)** ☐

1 unit:	no increase	2 1/2 - 3 units:	add 3 levels
1 1/2 units:	add 1 level	3 1/2 - 5 units:	add 4 levels
2 units:	add 2 levels	More than 5 units:	add 5 levels

8. **Highest of the Adjusted Offense Levels from Items 1-5 Above** ☐

9. **Combined Adjusted Offense Level (See §3D1.4)** ☐
   Enter the sum of Items 7 and 8 here and on Worksheet D, Item 1.

Worksheet C (Criminal History)

Defendant _____ Docket Number _____

Date Defendant Commenced Participation in Instant Offense (Earliest Date of Relevant Conduct) _____

1. 3 Points for each prior ADULT sentence of imprisonment exceeding ONE YEAR and ONE MONTH imposed within 15 YEARS of the defendant's commencement of the instant offense OR resulting in incarceration during any part of that 15-YEAR period. (See §§4A1.1(a) and 4A1.2.)

2. 2 Points for each prior sentence of imprisonment of at least 60 DAYS resulting from an offense committed ON OR AFTER the defendant's 18th birthday not counted under §4A1.1(a) imposed within 10 YEARS of the instant offense; and

   2 Points for each prior sentence of imprisonment of at least 60 DAYS resulting from an offense committed BEFORE the defendant's 18th birthday not counted under §4A1.1(a) from which the defendant was released from confinement within 5 YEARS of the instant offense. (See §§4A1.1(b) and 4A1.2.)

3. 1 Point for each prior sentence resulting from an offense committed ON OR AFTER the defendant's 18th birthday not counted under §4A1.1(a) or §4A1.1(b) imposed within 10 YEARS of the instant offense; and

   1 Point for each prior sentence resulting from an offense committed BEFORE the defendant's 18th birthday not counted under §4A1.1(a) or §4A1.1(b) imposed within 5 YEARS of the instant offense. (See §§4A1.1 (c) and 4A1.2.)

   NOTE: A maximum of 4 Points may be imposed for the prior sentences in Item 3.

Date of Imposition	Offense	Sentence	Release Date**	Guideline Section	Criminal History Pts.

* Indicate with an asterisk those offenses where defendant was sentenced as a juvenile.

** A release date is required in only three instances:

a. When a sentence covered under §4A1.1(a) was imposed more than 15 years prior to the commencement of the instant offense but release from incarceration occurred within such 15-year period;

b. When a sentence counted under §4A1.1(b) was imposed for an offense committed prior to age 18 and more than 5 years prior to the commencement of the instant offense, but release from incarceration occurred within such 5-year period; and

c. When §4A1.1(e) applies because the defendant was released from custody on a sentence counted under 4A1.1(a) or 4A1.1 (b) within 2 years of the instant offense or was still in custody at the time of the instant offense (see Item 5).

Total Criminal History Points for §§4A1.1(a), 4A1.1(b), and 4A1.1(c) (Items 1,2,3) ☐

Worksheet C

Defendant _____ Docket Number _____

4. 2 Points if the defendant committed the instant offense while under any criminal justice sentence (e.g., probation, parole, supervised release, imprisonment, work release, escape status). (See §§4A1.1(d) and 4A1.2.) List the type of control and identify the sentence from which control resulted. Otherwise, enter 0 Points. ☐

_____

5. 2 Points if the defendant committed the instant offense less than 2 YEARS after release from imprisonment on a sentence counted under §4A1.1(a) or (b) or while in imprisonment or escape status on such a sentence. However, enter only 1 Point for this item if 2 points were added at Item 4 under §4A1.1(d). (See §§4A1.1(e) and 4A1.2.) List the date of release and identify the sentence from which release resulted. Otherwise, enter 0 Points. ☐

_____

6. 1 Point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under §4A1.1(a), (b), or (c) because such sentence was considered related to another sentence resulting from a conviction of a crime of violence. *Provided*, that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion. (See §§4A1.1(f) and 4A1.2.) Identify the crimes of violence and briefly explain why the cases are considered related. Otherwise, enter 0 Points. ☐

   Note: A maximum of 3 Points may be imposed for Item 6.

_____

_____

_____

_____

_____

_____

_____

_____

7. **Total Criminal History Points** (Sum of Items 1-6) ☐

8. **Criminal History Category** (Enter here and on Worksheet D, Item 4) ☐

Total Points	Criminal History Category
0-1	I
2-3	II
4-6	III
7-9	IV
10-12	V
13 or more	VI

Worksheet D (Guideline Worksheet)

Defendant _____ District _____

Docket Number _____

1. **Adjusted Offense Level** (From Worksheet A or B)
   If Worksheet B is required, enter the result from Worksheet B, Item 9. Otherwise, enter the result from Worksheet A, Item 5. [ ]

2. **Acceptance of Responsibility** (See Chapter Three, Part E)
   Enter the applicable reduction. [__]

3. **Offense Level Total** (Item 1 less Item 2) [ ]

4. **Criminal History Category** (From Worksheet C)
   Enter the result from Worksheet C, Item 8. [ ]

5. **Terrorism/Career Offender/Criminal Livelihood/Armed Career Criminal** (see Chapter Three, Part A, and Chapter Four, Part B)

   a. Offense Level Total

      If the provision for Career Offender (§4B1.1), Criminal Livelihood (§4B1.3), or Armed Career Criminal (§4B1.4) results in an offense level total higher than Item 3, enter the offense level total. Otherwise, enter "N/A." [ ]

   b. Criminal History Category

      If the provision for Terrorism (§3A1.4), Career Offender (§4B1.1) or Armed Career Criminal (§4B1.4) results in a criminal history category higher than Item 4, enter the applicable criminal history category. Otherwise, enter "N/A." [ ]

6. **Guideline Range from Sentencing Table**
   Enter the applicable guideline range from Chapter Five, Part A. [ ] Months

7. **Restricted Guideline Range** (See Chapter Five, Part G)
   If the statutorily authorized maximum sentence or the statutorily required minimum sentence restricts the guideline range (Item 6) (see §§5G1.1 and 5G1.2), enter either the restricted guideline range or any statutory maximum or minimum penalty that would modify the guideline range. Otherwise, enter "N/A." [ ] Months

   [ ] Check here if §5C1.2 (Limitation on Applicabiity of Statutory Minimum Penalties in Certain Cases) applies.

8. **Undischarged Term of Imprisonment** (See §5G1.3)

   [ ] If the defendant is subject to an undischarged term of imprisonment, check this box and list the undischarged term(s) below.

   _____

   _____

   _____

Worksheet D

Defendant _____ Docket Number _____

9. **Sentencing Options** (Check the applicable box that corresponds to the Guideline Range entered in Item 6.)
(See Chapter Five, Sentencing Table)

☐ Zone A If checked, the following options are available (see §5B1.1):

- Fine (See §5E1.2(a))
- "Straight" Probation
- Imprisonment

☐ Zone B If checked, the minimum term may be satisfied by:

- Imprisonment
- Imprisonment of at least one month plus supervised release with a condition that substitutes community confinement or home detention for imprisonment (see §5C1.1(c)(2))
- Probation with a condition that substitutes intermittent confinement, community confinement, or home detention for imprisonment (see §5B1.1(a)(2) and §5C1.1(c)(3))

☐ Zone C If checked, the minimum term may be satisfied by:

- Imprisonment
- Imprisonment of at least one-half of the minimum term plus supervised release with a condition that substitutes community confinement or home detention for imprisonment (see §5C1.1(d)(2))

☐ Zone D If checked, the minimum term shall be satisfied by a sentence of imprisonment (see §5C1.1(f))

10. **Length of a Term of Probation** (See §5B1.2)

If probation is authorized, the guideline for the length of such term of probation is: (Check applicable box)

☐ At least one year, but not more than five years (if the offense level total is 6 or more)

☐ No more than three years (if the offense level total is 5 or less)

11. **Conditions of Probation** (See §5B1.3)

In addition to any mandatory conditions (1-8) or standard conditions (1-14), list any applicable special conditions:

_____

_____

_____

_____

_____

_____

Worksheet D

Defendant _____ Docket Number _____

12. **Supervised Release** (See §§5D1.1 and 5D1.2)

a. A term of supervised release is: (Check applicable box)

☐ Required because a term of imprisonment of more than one year is to be imposed or if required by statute

☐ Authorized but not required because a term of imprisonment of one year or less is to be imposed

b. Length of Term (Check applicable box)

☐ Class A or B Felony: Three to Five Year Term

☐ Class C or D Felony: Two to Three Year Term

☐ Class E Felony or Class A Misdemeanor: One Year Term

13. **Conditions of Supervised Release** (See §5D1.3)

In addition to any mandatory conditions (1-6) or standard conditions (1-15), list any applicable special conditions:

_____

_____

14. **Restitution** (See §5E1.1)

If an order of restitution is applicable, enter the amount. Otherwise, enter "N/A."

_____

15. **Fines**

a. Fines for Individual Defendants (See §5E1.2)	Minimum	Maximum
(1) If any of the counts of conviction has a statutory maximum penalty that exceeds $250,000 list the aggregate statutory maximum penalties for those counts.		$_____
(2) Fine Table:	$_____	$_____
(3) Guideline Range for Fines: (determined by the minimum and greater maximum above)	$_____	$_____

b. Cost of imprisonment $_____ (See §5E1.2(i))

Cost of probation, supervised release $_____

Cost of community confinement $_____

Worksheet D

Defendant _____ Docket Number _____

16. **Special Assessments** (See §5E1.3)

Enter the total amount of special assessments required for all counts of conviction**:**

- $25 for each misdemeanor count of conviction
- Not less than $100 for each felony count of conviction

$_____

17. **Additional Factors**

List any additional applicable guidelines, policy statements, and statutory provisions. Also list any applicable aggravating and mitigating factors that may warrant a sentence at a particular point either within or outside the applicable guideline range. Attach additional sheets as required.

Completed by _____ Date _____

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	**5**	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B							
	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	**12**	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D							
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life